Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 01–15–05 OF 2016 AND 01–16–05 OF 2016
AHMAD MAAROP CJ (MALAYA), ZAHARAH IBRAHIM, PRASAD SANDOSHAM, JEFFREY TAN AND ALIZATUL KHAIR FCJJ
8 JANUARY 2018

Bankruptcy — Capacity of bankrupt — Competency to file and maintain claim for reinstatement in employment — Respondents sought reinstatement under Industrial Relations Act 1967 ('the IRA') after being dismissed from employment — Industrial Court ('IC') which adjudicated their dispute with company pursuant to s 20(3) of the IRA ruled that respondents had been dismissed without just cause or excuse — When respondents appealed to Court of Appeal ('COA') against High Court's quashing of IC's award, they were undischarged bankrupts and remained so until COA allowed their appeals — Whether respondents incompetent to file and maintain their appeals without prior sanction of the Director-General of Insolvency ('DGI') — Whether COA's judgment in their favour was nullity — Whether proceeding under s 20(3) of the IRA personal claim that did not require DGI's prior sanction — Whether judicial review of the IC's award under s 20(3) of the IRA and all consequential appeals in connection with award were continuation of the challenge to award and did not require DGI's prior sanction — Whether respondents competently lodged and maintained their appeals at COA

Labour Law — Industrial Court — Jurisdiction — Employees cum directors were dismissed by company for opening and operating separate current account into which cheques payable to company were deposited — Employees sought reinstatement in reference of their dispute to Industrial Court ('IC') under s 20(3) Industrial Relations Act 1967 — Whether IC acted without jurisdiction, asked wrong questions, applied wrong law and failed to adjudicate on alleged misconduct and reached irrational result — Whether IC instead of adjudicating whether alleged misconduct had been committed and, if so, whether it warranted dismissal had instead adjudicated on whether criminal breach of trust ('CBT') had been committed — Whether IC's ruling that company had to prove CBT to justify dismissals wrong, illogical and irrational — Whether misconduct inside employment did not need to amount to crime to justify dismissal — Whether any reasonable tribunal would have found that misconduct alleged against employees and admitted by them warranted dismissal

The respondents in the appeals herein ('Nadiah' and 'Yong') were

directors/shareholders in a company which also employed them, respectively, as its chief executive officer and executive officer. The respondents were dismissed from employment without a domestic enquiry when they failed to reply to a show-cause letter which accused them of committing misconduct by — without the company's knowledge and authorisation — using a directors' resolution they had jointly signed to open and operate a bank current account ('the Perwira account') in the company's name into which cheques payable to the company were deposited. Nadiah, in particular, was accused of gross dereliction of duty in failing to keep true and proper records of the company and in failing to promptly deposit into the company's legitimate accounts cheques that were payable to the company. The respondents filed representations under the Industrial Relations Act 1967 ('the IRA') seeking reinstatement to their jobs. Pursuant to s 20(3) of the IRA, the Minister referred their dispute to the Industrial Court ('IC') for an award. While the matter was pending in the IC, the company was wound up and the appellant was joined as a party to the IC's proceedings. Following a trial, the IC ruled that the respondents were dismissed without just cause or excuse because their alleged misconduct amounting to criminal breach of trust was not proven. The appellants filed a judicial review application in the High Court to quash the IC's award and succeeded. The respondents appealed to the Court of Appeal ('COA') which set aside the High Court's decision and restored the IC's award holding, inter alia, that since the IC had accepted the respondents' version, it was not open to the High Court to substitute its own decision for that made by the IC. At the time the respondents filed their respective appeals to the COA, they were undischarged bankrupts and although they had applied to the Director-General of Insolvency ('DGI') for sanction to lodge the appeals, the sanctions only came through after the COA had allowed their appeals. In the instant appeal against the COA's decision leave was granted to raise the following questions of law, inter alia: (a) whether the COA's judgment in favour of the respondents was a nullity when they had not obtained the DGI's sanction to lodge and prosecute their appeals; and (b) whether the COA was right in holding that the complaint of misconduct against the respondents could not stand in the absence of any allegation that their misconduct was criminal in nature.

Held, allowing the appeals, setting aside the COA's decision and restoring the decision of the High Court:

(1) A proceeding under s 20(3) of the IRA was a personal claim that did not require the previous sanction of the DGI. This court prospectively overruled all cases that held to the contrary and all cases that followed them. Since judicial review of an award under s 20(3) of the IRA and consequential appeals were also a continuation of the challenge to the

award, they should also not require the previous sanction of the DGI. The respondents were competent to lodge their appeals at the COA (see para 33).

(2) The IC acted without jurisdiction, asked the wrong questions, applied the wrong law, utterly failed to rule on the alleged misconduct and explanation and reached an irrational result. Though not for the same reasons, the High Court was nonetheless right to quash the IC's award. In its award, the IC appreciated that the main allegation of misconduct against the respondents was that they had opened and operated the Perwira account without the authority of the board of directors. Given that that was the main allegation, the IC should have proceeded to determine: (i) whether the operation of the Perwira account was without authority; and (ii) if without authority, then whether the operation of the Perwira account was misconduct that warranted dismissal. But that was not how the IC went about it. The approach of the IC was that of a court sitting in judgment of a criminal charge and requiring the prosecution to prove criminal breach of trust ('CBT'). The IC held that the appellant had to prove CBT to justify the dismissals. The COA also had the notion that only criminal conduct could justify the dismissals. The COA held that 'it was essential to note that the show-cause letter per se did not allege any form of criminal conduct such as misappropriation, etc — more so when both the appellants were directors of the company — to fall within the definition of misconduct'. The COA held that the complaint, taken objectively, did not qualify as misconduct. It effectively held that misconduct in employment must amount to criminal conduct to justify dismissal. The COA could not be more wrong. Misconduct inside employment need not amount to a crime to justify dismissal (see paras 38–39 & 47).

(3) The award of the IC could be reviewed for substance as well as for process. The IC lost sight of the issue when it proceeded to adjudicate on CBT instead of misconduct in employment and when it did that, the IC acted without jurisdiction, took into account an irrelevant matter, namely CBT, and failed to take into account the relevant matter of evidence of misconduct and the complaint that the respondents had opened and operated the Perwira account without authority of the company. The respondents did not deny that they opened and operated the Perwira account and deposited the company's monies into that account. They explained that they did so to prevent the transfer of the company's funds to Singapore. But it was not appreciated that what the respondents had done was to put the company's funds into their absolute control and beyond the reach of the company. The respondents might have been directors/minority shareholders of the company, but in their capacity as employees tasked with the day-to-day management of the company, was it right for them to have put the funds of the company in

their absolute control and beyond the reach and control of the company? Would that behaviour not warrant dismissal? It must surely be that an employee who put funds of his employer beyond the reach and control of his employer warranted dismissal. Any reasonable tribunal would have found that the dismissal of the respondents was with just cause (see para 46).

[Bahasa Malaysia summary

Responden-responden dalam rayuan-rayuan ini ('Nadiah' dan 'Yong') ialah pengarah-pengarah/pemegang-pemegang saham dalam syarikat yang juga telah mengambil mereka bekerja, masing-masingnya, sebagai ketua pegawai eksekutif dan pegawai eksekutifnya. Responden-responden telah dipecat daripada pekerjaan tanpa siasatan dalaman apabila mereka gagal menjawab surat tunjuk sebab yang menuduh mereka melakukan salah laku dengan — tanpa pengetahuan dan kebenaran syarikat — menggunakan satu ketetapan pengarah-pengarah mereka telah secara bersama menurunkan tandatangan untuk membuka dan mengendalikan akaun bank semasa ('akaun Perwira') dalam nama syarikat yang mana cek-cek yang kena dibayar kepada syarikat didepositkan. Nadiah, khsuusnya, telah dituduh melalaikan kewajipan dengan melampau kerana gagal menyimpan rekod-rekod syarikat dengan sebenar dan teratur dan gagal untuk mendepositkan dengan segera deposit ke dalam akaun-akaun sah syarikat cek-cek yang kena dibayar kepada syarikat. Responden-responden telah memfailkan representasi di bawah Akta Perhubungan Perindustrian 1967 ('APP') memohon pengembalian semula jawatan mereka. Menurut s 20(3) APP, Menteri merujuk pertikaian mereka kepada Mahkamah Perindustrian ('MP') untuk suatu award. Sementara perkara itu masih belum selesai di MP, syarikat telah digulung dan perayu telah dimasukkan sebagai suatu pihak kepada prosiding MP. Berikutan suatu perbicaraan, MP telah memutuskan bahawa responden-repsonden dipecat tanpa sebab atau alasan yang adil kerana salah laku mereka yang merupakan pecah amanah tidak dibuktikan. Perayu-perayu telah memfailkan permohonan semakan kehakiman di Mahkamah Tinggi untuk membatalkan award MP dan berjaya. Responden-responden telah merayu kepada Mahkamah Rayuan ('MR') yang telah mengetepikan keputusan Mahkamah Tinggi dan mengembalikan keputusan award MP, antara lain, bahawa oleh kerana MP telah menerima versi responden-responden, ia tidak terbuka kepada Mahkamah Tinggi untuk menggantikan keputusannya sendiri yang telah dibuat oleh MP. Pada masa responden-responden telah memfailkan rayuan-rayuan masing-masing kepada MR, mereka adalah bankrap yang tidak dilepaskan dan meskipun mereka telah memohon kepada Ketua Pengarah Insolvensi ('KPI') untuk sanksi bagi membuat rayuan-rayuan itu, sanksi-sanksi itu hanya diperoleh slepas MR membenarkan rayuan-rayuan mereka. Dalam rayuan ini terhadap keputusan MR kebenaran telah diberikan untuk menimbulkan persoalan undang-undang berikut, antara lain: (a) sama ada penghakiman MR yang menyebelahi responden-responden adalah terbatal

apabila mereka tidak memperoleh sansksi KPI untuk membuat dan mendakwa rayuan-rayuan mereka; dan (b) sama ada MR adalah betul dalam memutuskan bahawa aduan tentang salah laku terhadap responden-responden tidak boleh kekal kerana ketiadaan apa-apa pengataan bahawa salah laku mereka adalah bersifat jenayah.

Diputuskan, membenarkan rayuan-rayuan, mengetepikan keputusan MR dan mengembalikan keputusan Mahkamah Tinggi:

(1) Prosiding di bawah s 20(3) APP adalah tuntutan persendirian yang tidak menghendaki sanksi terdahulu KPI. Mahkamah ini secara prospektif menolak semua kes yang diputuskan bertentangan dan semua kes yang mengikut mereka. Oleh kerana semakan kehakiman suatu award di bawah s 20(3) APP dan rayuan berbangkit adalah juga kesinambungan cabaran kepada award itu, mereka juga tidak patut memerlukan sansksi terdahulu KPI. Responden-responden adalah kompeten untuk membuat rayuan-rayuan mereka di MR (lihat perenggan 33).

(2) MP telah bertindak tanpa bidang kuasa, bertanyakan soalan yang salah, mengguna pakai undang-undang yang salah, benar-benar gagal untuk memutuskan berhubung salah laku dan pejelasan yang dikatakan dan tiba kepada keputusan yang tidak rasional. Walaupun bukan untuk sebab yang sama, Mahkamah Tinggi walau apa pun adalah betul untuk membatalkan award MP. Dalam awardnya, MP memahami bahawa pengataan utama salah laku terhadap responden-responden adalah bahawa mereka telah membuka dan mengendalikan akaun Perwira tanpa kebenaran lembaga pengarah. Berdasarkan itu adalah pengataan utama, MP sepatutnya untuk seterusnya menentukan: (i) sama ada pengendalian akaun Perwira adalah tanpa keenaran; dan (ii) jika tanpa kebenaran, maka sama ada pengendalian akaun Perwira itu adalah salah laku yang mewajarkan pemecatan. Namun begitu ia bukan bagaimana MP mengendalikannya. Pendekatan MP adalah sebagai suatu mahkamah yang bersidang untuk penghakiman pertuduhan jenayah dan yang memerlukan pendakwaan bagi membuktikan pecah amanah ('PA'). MP memutuskan bahawa perayu telah membuktikan PA bagi mewajarkan pemecatan-pemecatan itu. MR juga mempunyai tanggapan bahawa hanya perbuatan jenayah boleh mewajarkan pemecatan-pemecatan itu. MR memutuskan bahawa 'it was essential to note that the show-cause letter per se did not allege any form of criminal conduct such as misappropriation, etc — more so when both the appellants were directors of the company — to fall within the definition of misconduct'. MR memutuskan bahawa aduan itu, dilihat secara objektif, tidak layak sebagai salah laku. Ia secara efektif memutuskan bahawa salah laku dalam pekerjaan perlu merupakan perbuatan jenayah bagi mewajarkan pemecatan. MR tidak boleh lebih salah. Salah laku dalam pekerjaan tidak perlu merupakan jenayah bagi mewajarkan

pemecatan (lihat perenggan 38–39 & 47).

(3) Award MP boleh disemak semula untuk substans dan juga untuk proses. MP tersasar daripada isu apabila ia terus mengadili atas PA dan bukan salah laku dalam pekerjaan dan apabila ia berbuat demikian, MP telah bertindak tanpa bidang kuasa, mengambil kira perkara yang tidak relevan, terutamanya PA, dan gagal mengambil kira perkara yang relevan berhubung keterangan salah laku dan aduan bahawa responden-responden telah mebuka dan mengendalikan akaun Perwira tanpa kebenaran syarikat. Responden-responden tidak menafikan bahawa mereka telah membuka dan mengendalikan akaun Perwira dan mendepositkan dana syarikat ke Singapura. Namun ia tidak difahami bahawa apa yang responden-responden telah lakukan adalah untuk meletakkan dana syarikat dalam kawalan mutlak mereka dan di luar jangkauan syarikat. Responden-responden mungkin pengarah-pengarah/pemegang-pemegang saham minoriti syarikat, tetapi dalam kapasiti mereka sebagai pekerja yang ditugaskan dengan pengurusan harian syarikat, adalah ia wajar untuk mereka meletakkan dana syarikat dalam kawalan mutlak mereka dan di luar jangkauan dan kawalan syarikat? Adakah kelakuan tersebut tidak mewajarkan pemecatan? Ia semestinya jika seorang pekerja yang meletakkan dana majikan di luar jangkauan dan kawalan majikannya mewajarkan pemecatan. Mana-mana tribunal munasabah akan mendapati bahawa pemecatan responden-responden adalah dengan sebab yang adil (lihat perenggan 46).]

Notes

For cases on capacity of bankrupt in general, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3342–3385.

For cases on jurisdiction, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1856–1922.

Cases referred to

Alimahton Aridan v Bata Marketing Sdn Bhd [2013] 2 LNS 1115, IC (refd)

Amos William Dawe v Development & Commercial Bank (Ltd) Berhad [1981] 1 MLJ 230, FC (refd)

Attorney General of Belize and others v Belize Telecom Ltd and another [2009] 1 WLR 1988, PC (refd)

Azian Othman lwn Roda Istimewa Sdn Bhd [2010] 2 LNS 1552, IC (refd)

BCE Inc v 1976 Debentureholders [2008] 3 SCR 560, SC (refd)

Bailey v Thurston & Co, Limited [1903] 1 KB 137, CA (refd)

Bathamani a/p Suppiah v Southern Finance Co Bhd [2000] 6 MLJ 427, HC (refd)

Beckham v Drake (1849) 2 HL Cas 579 (refd)

Best Engineering Services & Trading v Beh Sun Sun [2004] 3 ILR 444, IC (refd)

A *Canada Packers Inc and United Food and Commercial Workers, Re* [1983] BCCAAA No 190 (refd)
Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd [1996] 4 MLJ 271, HC (refd)
Chua Tin Hong, ex p Castrol (M) Sdn Bhd, Re [1996] MLJU 608; [1997] 3
B CLJ SUPP 174, HC (refd)
Cisco (M) Sdn Bhd v K Supramaniam [2002] 1 ILR 881, IC (refd)
Da Costa v Optolis [1977] IRLR 178 (refd)
Dato' Kuah Tian Nam v Tan Wrun Peng [2009] 9 MLJ 464, HC (refd)
Dr A Dutt v Assunta Hospital [1981] 1 MLJ 304, FC (refd)
C *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492, HL (refd)
Goh Eng Hwa v M/s Laksamana Realty Sdn Bhd [2004] 3 MLJ 97, CA (refd)
Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd [2007] 1 SLR 940, CA (refd)
D *Golden Hope Plantations Bhd v Suriya Moorthy Munusamy* [2001] 3 ILR 804, IC (refd)
Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129, FC (refd)
Grady v HM Prison Service [2003] EWCA Civ 527, CA (refd)
Heath v Tang and another; Stevens v Peacock and others [1993] 4 All ER 694, CA
E (refd)
Hercules Engineering (SEA) Sdn Bhd v Cheah Khee How [2006] 4 ILR 2308, IC (refd)
Ho Ken Seng v Progressive Insurance Sdn Bhd [2013] 2 MLJ 335; [2013] 2 AMR 109, FC (refd)
F *Iron Ore Company of Canada v United Steelworkers of America, Local 5795, Re* [1992] Nfld LAA No 2 (refd)
Joseph Patrick Cummings v Claremont Petroleum NL and anor (1996) 137 ALR 1, HC (refd)
K Ismail Ganey Rowther and company first defendant v MA Abdul Kader, the
G *official assignee of the property of KP Peer Mohamed, a bankrupt* [1933] 2 MLJ 98 (refd)
KEB Designers & Producers Sdn Bhd & Anor v Ong Ming Huat [2000] 1 ILR 46, IC (refd)
Kenyon Road Haulage Ltd v Kingston [2014] All ER (D) 44 (Oct) (refd)
H *Kesang Leasing Sdn Bhd v Dato' Hj Mat @ Mat Shah bin Ahmad & Ors* [2009] 7 MLJ 305, HC (refd)
Khan v Trident Safeguards Ltd and others [2004] EWCA Civ 624, CA (refd)
Khoo Kim Hock, Re [1974] 2 MLJ 29 (refd)
Krishan Murari Lal Sehgal v State of Punjab 1977 AIR 1233, SC (refd)
I *Lakeside Colony of Hutterian Brethren v Hofer* [1992] 3 SCR 165, SC (refd)
Laurie v Fairburn IDS Brief 109 (refd)
Lim Tai Nian; ex p Kewangan Utama Bhd, Re [2001] 4 MLJ 78, HC (refd)
Malayan Banking Bhd v Mohd Bahari bin Mohd Jamli @ Mohd Jamal [2003] 4 MLJ 432, CA (refd)

Mashkon Hj Samuri v Orang Kampung Holdings (M) Sdn Bhd [2008] 2 LNS 0894, IC (refd)
Mohamad Aminuddin Md Zain & Anor v Perbadanan Usahawan Nasional Bhd [2006] 3 ILR 2172, IC (refd)
Multicore Solders (Malaysia) Sdn Bhd v Donny Yeo Kuei Chwan [2004] 1 ILR 1292, IC (refd)
Murphy v Stone Wallwork (Charlton) Ltd [1969] 2 All ER 949, HL (refd)
NA Classic Sdn Bhd v Julkarnain Pauji [1999] 2 ILR 186, IC (refd)
Ord v Upton [2000] Ch 352, CA (refd)
Owens v Comlaw (No 62) Pty Ltd & Ors [2006] VSCA 151, SC (refd)
O'Neill and another v Phillips and others, Re a company [1999] 2 BCLC 1, HL (refd)
Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt) [2006] 6 MLJ 511, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
Saul D Harrison & Sons plc, Re [1995] 1 BCLC 14, CA (refd)
S Krishnaswamy And Ors v South India Film Chamber of Commerce AIR 1969 Mad 42, HC (refd)
Saunders (a bankrupt), Re; Re Bearman (a bankrupt) [1997] 3 All ER 992, Ch D (refd)
Soo Ee & Co Sdn Bhd v Ang Chin Suan [1997] 3 ILR 62, IC (refd)
Standard Chartered Bank v Loh Chong Yong Thomas [2010] 2 SLR 569, CA (refd)
Sunil Dev And Others v Delhi And District Cricket Association 1994 80 CompCas 174 Delhi, HC (refd)
Swiss Garden Rewards Sdn Bhd v Mohamed Ashrof Tambi bin Abdullah & Ors [2017] MLJU 844, CA (refd)
Tan Kim Chua v Rockhill Sdn Bhd [2009] 2 LNS 0286, IC (refd)
Tan Poh Thiam v Industrial Court of Malaysia [2015] MLJU 974, CA (refd)
Tanjong Puteri Golf Resort Bhd v John Supatever [2001] 3 ILR 176, IC (refd)
Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129, CA (refd)
Thein Tham Sang v United States Army Medical Research Unit & Anor [1983] 2 MLJ 49; [1983] 1 CLJ 240, FC (refd)
Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1, FC (refd)
Yapp v Foreign and Commonwealth Office [2014] EWCA Civ 1512, CA (refd)
Yong Peng Kean v Akira Sales & Services (M) Sdn Bhd [2015] MLJU 737, CA (refd)
Young v Plenty District Health Board (No 2) (2013) 11 NZERL 478 (refd)

Legislation referred to

Bankruptcy Act (Cap 20) [SG] s 131(1)(a)
Bankruptcy Act 1966 [AUS] s 60(2), (5)
Bankruptcy Enactment 1912 s 33(i)(a)
Courts of Judicature Act 1964 s 3
Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 [UK] rr 4(8), 15(2)(d)
Industrial Relations Act 1967 s 20(3)
Insolvency Act 1967 (previously known as Bankruptcy Act 1967) ss 2, 8(1)(b), 38(1)(a)
Insolvency Act 1986 [UK] ss 283(1), 306, 436
Penal Code s 405

Cyrus Das (Janice Leo and Gregory Das with him) (Shook Lin & Bok) for the appellant.
Bastian Vendargon (Anand Ponnudurai and Suria Kumar with him) (Suria Kumar & Co) for the respondents.
Norina Zainol Abidin (Senior Federal Counsel) for the Malaysian Department of Insolvency.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] These appeals arose from two Industrial Court awards ('awards') which held that the dismissal of the respondents by TT Electrical Electronics Corp (M) Sdn Bhd ('company') on 21 March 2000 was without just cause or excuse.

[2] The respondents, who were directors/minority shareholders as well employees of the company, were responsible for the day to day management of the company. On 13 March 2000, the company issued the following show cause letters to the respondents:

Date: 13.3.2000

Puan Nadiah Zee Binti Abdullah

Dear Madam,

Re: Employment as Chief Executive Officer

1 You are alleged to have misconducted yourself as follows:-

1.1 Opening of Bank Account Without Authorisation

You are reported:-

i) To have without the authority of the Board of Directors and in collaboration with the Executive Officer of the Company, Yong Peng Kean, caused to be opened on 25.10.1999 a current account in the name of the Company with Perwira

Affin Bank at No. 2, Jalan Hujung Permatang 2 (26/25B), Section 26, 40000 Shah Alam, Selangor Darul Ehsan bearing No: 0631040000002059 and to be operated jointly by you and Yong Peng Kean *("the Current Account")* by using a Board of Directors' Resolution In Writing dated 25.10.1999 signed only by you and Yong Peng Kean;

ii) to have in collaboration with Yong Peng Kean and kept from the Company's knowledge, deposited into the Current Account payments made to the Company; and

iii) to have in collaboration with Yong Peng Kean and kept from the Company's knowledge, conducted transactions using the Current Account from 26.10.1999 to 06.03.2000;

1.2 Gross dereliction of duties in failing to keep true and proper records of the Company

It is reported:-

i) that you have failed/neglected to ensure that due and proper records of all transactions conducted using the Current Account were promptly and regularly entered into the Company's accounting system;

ii) in view thereof, you had knowingly allowed the Company's business to be conducted based on incomplete records;

iii) that it was when Mr Theu Boon Ooi, the Executive Director, discovered that there may be a current account opened in the name of the Company with a bank for which the Board of Directors did not authorize and/or have no knowledge of and for which no record was kept by the Company, you had on 8 March 2000 and 9 March 2000 personally caused to be entered into the Company's accounting system, all transactions conducted using the Current Account; and

iv) that after having done (iii) above, you had on the evening of 9 March 2000 forwarded to the Company's accountant, Tay Way Ming, a file containing documents purporting to be the transactions that you and Yong Peng Kean conducted using the Current Account.

1.3 Dereliction in duties in failing to promptly deposit payment of cheques made to the Company

It is reported that despite it being known to you that the Company was having cash flow problem which was adversely affecting the business of the Company, you failed/neglected to cause to be deposited into the Company's bank accounts the following cheque payments collected by the Company:-

Name of Customer	Amount (RM)	Cheque No.	Date of Cheque	Date of Cheque deposited in bank
Electronic land	237,448.60	RHB 448492	29.02.2000	08.03.2000
Layering	4,658.72	PBB 204525	29.02.2000	08.03.2000
Perniagaan Yee Tai	37,618.60	RHB 891009	29.02.2000	08.03.2000
Sykt Elektronik Masai Jaya	200,000.00	MMB 264655	29.02.2000	08.03.2000
Soon Fatt Electrical & Trading Co	10,458.66	OBB 076663		08.03.2000

2. You are hereby given an opportunity to submit your explanation in writing WITHIN SEVEN (7) DAYS from the date hereof as to why your contract of service with the Company should not be terminated. Please note that should you fail to give any reasonable explanation within the stipulated time, we will assume that you have no explanation to offer and will proceed to consider your services as having been terminated.

3. Since the charges levelled against you are of a grave and serious nature, you are forthwith suspended from your duties as the Company's Chief Executive Officer pending the receipt of your written explanation and a decision has been made. During the period of suspension, you are not permitted to enter the Company's premises unless duly required to do so or with our prior written consent signed by the Chairman.

4. Please acknowledge receipt on the duplicate hereof.

Yours faithfully,

ITT Electrical Electronics Corporation (M) Sdn Bhd

Sgd.

Chairman

Date: 13.3.2000

Mr Yong Peng Kean

Dear Sir,

Re: Employment as Executive Officer

1. You are alleged to have misconducted yourself as follows:-

1.1. You are reported:-

i) to have without the authority of the Board of Directors and in collaboration with the Chief Executive Officer of the Company, Nadiah Zee Binti Abdullah, caused to be opened a current account in the name of the Company with Perwira Affin Bank at No. 2, Jalan Hujung Permatang 2 (26/25B), Section 26, 40000 Shah Alam, Selangor Darul Ehsan bearing No: 0631040000002059 and to be operated jointly by you and Nadiah Zee Binti Abdullah *("the Current Account")* by using a Board of Directors' Resolution In Writing dated 25.10.1999 signed only by you and Nadiah Zee Binti Abdullah;

ii) to have in collaboration with Nadiah Zee Binti Abdullah and kept from the Company's knowledge, deposited into the Current Account payments made to the Company by the Company's customers; and

iii) to have in collaboration with Nadiah Zee Binti Abdullah and kept from the Company's knowledge, conducted transactions using the Current Account from 26.10.99 to 6.3.2000;

2. You are hereby given an opportunity to submit your explanation in writing WITHIN SEVEN (7) DAYS from the date hereof as to why your contract of service with the Company should not be terminated. Please note that should you fail to give any reasonable explanation within the stipulated time, we will assume that you have no explanation to offer and will proceed to consider your services as having been terminated.

3. Since the charges levelled against you are of a grave and serious nature, you are forthwith suspended from your duties as the Company's Executive Officer pending the receipt of your written explanation and a decision has been made. During the period of suspension, you are not permitted to enter the Company's premises unless duly required to do so or with our prior written consent signed by the Chairman.

4. Please acknowledge receipt on the duplicate hereof.

Yours faithfully,

ITT Electrical Electronics Corporation (M) Sdn Bhd

Sgd.

Chairman

[3] Following the show cause letters, the company, by letters dated 24 March 2000, terminated the employment of the respondents with effect from 21 March 2000. That letter dated 24 March 2000 stated that the respondents had not submitted their explanation. On the basis that there was no explanation, the appellant dismissed the respondents without a domestic enquiry. The respondents made representation, on 20 April 2002, to be reinstated. The representation was referred to the Industrial Court for an award. Meantime, on 1 December 2004, the company was wound up. Pursuant to order of court dated 6 July 2006, the appellant was joined as a party. Both the company and appellant were in the group of companies controlled by one TT Corp Pte Ltd of Singapore. The appellant represented the parent company in Malaysia.

[4] Both respondents testified that they gave their oral explanation to Theu Boon Ooi, the chairman of the Appellant and executive director of the company. At paras [12] and [13] of the award, the Industrial Court ('IC') related that the respondents also testified to the following. Theu refused to entertain their oral explanation or acknowledge their written explanation. 'Theu took both copies (of the written explanation) and asked them to leave the office immediately, failing which, he said, he would get the security guard to escort them out of the company premises'. At para [38] of the award, the IC imparted that the respondents, whilst under cross-examination, were repeatedly asked whether they were aware that their operation of the Perwira Affin account ('Perwira account') amounted to criminal breach of trust ('CBT'). The respondents defended their operation of the Perwira account by reliance on a resolution passed by the respondents pursuant to article 90 of the articles of association of the company which read:

> A resolution in writing signed by a majority of the Directors for the time being or their alternates not being less than two Directors shall be as valid and effectual as if it had been passed by a meeting of Directors duly called and constituted.

[5] The respondents also testified that they opened and operated the Perwira account 'to prevent the parent company from transferring company's funds to Singapore, that they promptly deposited all payments received into the Perwira account, that all monies in the Perwira account remained intact, that all

accounting records were properly kept, that all transactions relating to the Perwira account were done by the company's accountant, and that they had informed Theu of the opening of the Perwira account.

[6] The IC held that the alleged misconduct, which according to the IC tantamounted to CBT, was not proved. On judicial review, the High Court quashed the award on account of four reasons: (1) the IC erred in law in invoking the adverse inference against the appellant for not calling Theu to testify; (2) it was not proved that the written explanation of the respondents was forwarded to Theu; (3) the IC failed to consider the admission by the respondents that they did not protest when the letter of dismissal was issued to them; and (4) the IC failed to take into consideration that it was the previous practice of the company that the signatories of bank accounts of the company must include one director from Malaysia and one director from Singapore. On appeal, the Court of Appeal reversed the order of the High Court on account of two reasons: (1) the IC accepted the respondents' version and the law did not permit the High Court in judicial review to substitute that finding; and (2) the IC had not invoked any adverse inference against the appellant. The Court of Appeal set aside the order of the High Court and restored the award (for the judgment of the Court of Appeal, see *Yong Peng Kean v Akira Sales & Services (M) Sdn Bhd* [2015] MLJU 737). The appellant obtained leave to appeal to this court on the following questions of law:

(a) whether a judgment by the Court of Appeal for a monetary sum in favour of an undischarged bankrupt is a nullity when the appellant failed to disclose to the court that he did not have the sanction of the Insolvency Department to prosecute the appeal?

(b) whether the interpretation of the articles of association of a company is subject to past practices of the directors in relation to its implementation or the exercise of the power under it? and

(c) whether misconduct in employment law to warrant punishment is to be distinguished from criminal conduct by an employee and whether the Court of Appeal was correct in law in concluding that in the absence of an allegation of 'any form of criminal conduct' the complaint 'taken objectively, will not qualify as a misconduct'?

[7] Written submissions before us addressed all three 'questions of law'. But oral submissions were primarily focused on the first question of law. It transpired that both respondents were bankrupts when they filed their respective appeals to the Court of Appeal. According to learned counsel for the appellant who was not contradicted: (i) the first respondent (Nadiah) and second respondent (Yong Peng Kean) were adjudged bankrupts on 2 August 2006 and 24 November 2011 respectively; (ii) on 17 July 2012, the IC delivered the awards; (iii) on 29 January 2013, the High Court delivered its

judgment; (iv) on 21 February 2013, the respondents lodged their appeals to the Court of Appeal; (v) on 27 June 2014, the respondents applied for sanction from the Director General of Insolvency ('DGI') to lodge their appeals; (vi) on 7 August 2014, the Court of Appeal allowed the appeals; and (vii) on 13 May 2015, the respondents obtained sanction from the DGI.

SUBMISSION OF THE APPELLANT

[8] Given that sanction was obtained after the Court of Appeal had delivered its decision, learned counsel for the appellant submitted that the respondents had no sanction to prosecute their appeals at the Court of Appeal. The appeals were void (learned counsel cited *Goh Eng Hwa v M/s Laksamana Realty Sdn Bhd* [2004] 3 MLJ 97 at held [2] and [4]). The word 'action' in s 38(1)(a) includes the filing of the notice of appeal (learned counsel cited *Amos William Dawe v Development & Commercial Bank (Ltd) Berhad* [1981] 1 MLJ 230, where the Federal Court struck out the appeal on the premise that it was filed without the previous sanction of the DGI). Sanction cannot operate retrospectively, because of the word 'previous' (learned counsel cited *Swiss Garden Rewards Sdn Bhd v Mohamed Ashrof Tambi bin Abdullah & Ors* [2017] MLJU 844). In *Krishan Murari Lal Sehgal v State of Punjab* 1977 AIR 1233, the Indian Supreme Court held that the words 'previous sanction' do not contemplate subsequent ratification. In *Standard Chartered Bank v Loh Chong Yong Thomas* [2010] 2 SLR 569, the Singapore Court of Appeal held that the sanction required by s 131(1)(a) of the Singapore Bankruptcy Act 2000 (which is in pari materia with s 38(1)(a)) means prior sanction and not retrospective sanction. Sanction came nine months after the decision of the Court of Appeal. The sanction, which did not specify that it was to be retrospective, had no retrospective effect (learned counsel cited *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1). The words 'previous sanction' would militate against retrospective sanction (learned counsel again cited *Krishan Murari Lal Sehgal v State of Punjab*). The decision of the Court of Appeal was a nullity. Sanction was not an issue in the courts below as the appellant was not aware that the respondents were bankrupts. The appellant only came to know that the respondents were bankrupts during the course of its application to the Court of Appeal for a stay of execution of the awards, in which application the respondents disclosed the sanction dated 13 May 2015. The respondents should not be allowed to retain the benefit of a judgment obtained by concealment of the fact of their bankruptcy (learned counsel cited *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949 at p 951).

[9] In relation to the second 'question of law', the written submission of the appellant advanced the following arguments. The respondents opened and operated the Perwira account without the authorisation of the Singapore directors. The respondents defended their action by reliance on a board resolution dated 25 October 1999 which they had passed without prior

reference to the Singapore directors. That resolution provided that the respondents would be the sole and exclusive signatories of the Perwira account. The respondents relied on article 90. Operation of the Perwira account was a clear deviation from the practice of the company in the operation of its bank accounts. It was an established practice of the appellant that 'not less than two directors' meant one director from Malaysia and one director from Singapore. Both respondents admitted that they were aware of that practice. But the IC held that the Perwira account was opened in accordance with article 90. The High Court disagreed. The High Court held that the IC failed to consider the respondents' failure to follow the practice of the company. Case law from other jurisdictions recognise that the articles of a company are to be read or applied subject to established practices in the organisation (learned counsel cited *S Krishnaswamy And Ors v South India Film Chamber of Commerce* AIR 1969 Mad 42, *Sunil Dev And Others v Delhi And District Cricket Association* 1994 80 CompCas 174 Delhi, *Ebrahimi v Westbourne Galleries Ltd and others* [1972] 2 All ER 492, *O'Neill and another v Phillips and others, Re a company* [1999] 2 BCLC 1, *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, *Lakeside Colony of Hutterian Brethren v Hofer* [1992] 3 SCR 165, *BCE Inc v 1976 Debentureholders* [2008] 3 SCR 560, *Golden Harvest Films Distribution (Pte) Ltd v Golden Village Multiplex Pte Ltd* [2007] 1 SLR 940). The articles were silent on the number of required signatories for the operation of bank accounts. The sole and exclusive rule that governed the operation of bank accounts was the past practice of the appellant. In *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] 1 WLR 1988, a term was implied into the articles to give effect to the understanding of shareholders. It would follow from the Indian, British, Canadian and Singapore positions, that the appellant's reliance on past practice should be recognised and enforced. The respondents themselves acknowledged that past practice governed the operation of the bank accounts of the appellant. Therefore, the IC erred in failing to appreciate that dismissal was wholly justified in view of the respondents' failure to follow past practice of the company, and in failing to consider why the respondents deviated from past practice. By their operation of the Perwira account without the knowledge of the Singapore directors, the respondents acted in patent contravention of the practice of the appellant. The respondents were guilty of the charges preferred.

[10] On the third 'question of law', the written submission of the appellant submitted that the finding of the Court of Appeal, to wit that 'the show cause letter per se does not allege any form of criminal conduct ... to fall within the definition of misconduct ... the above complaint ... will not qualify as a misconduct', was an error that should be reversed on two grounds: (1) misconduct in employment law is to be distinguished from a criminal wrongdoing. Misconduct in employment law is wider than criminal conduct (learned counsel cited *Yapp v Foreign and Commonwealth Office* [2014] EWCA Civ 1512, *Kenyon Road Haulage Ltd v Kingston* [2014] All ER (D) 44 (Oct),

Re Iron Ore Company of Canada v United Steelworkers of America, Local 5795 [1992] Nfld LAA No 2 and *Re Canada Packers Inc and United Food and Commercial Workers* [1983] BCCAAA No 190). In *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129 the Court of Appeal observed that the IC ought not to consider the purported criminality of the misconduct. The finding that there must be an assessment of the criminality of the charges was contrary to Telekom Malaysia and should be reversed; (2) the misconduct was sufficient to warrant dismissal. The respondents operated the Perwira account without prior authorisation. That misconduct would qualify as an act of misappropriation in criminal law and or an act of gross misconduct. RM2.6m was deposited into the Perwira account between October 1999 and March 2000. That money which was payable to the appellant should have been deposited in the legitimate accounts of the appellant. Operation of the Perwira account and deposit of monies that belonged to the appellant in the Perwira account constituted acts that warranted dismissal. Unauthorised creation of a company account and unauthorised use of company funds are considered as misconduct that warrants dismissal (learned counsel cited *Golden Hope Plantations Bhd v Suriya Moorthy Munusamy* [2001] 3 ILR 804 and *Mohamad Aminuddin Md Zain & Anor v Perbadanan Usahawan Nasional Bhd* [2006] 3 ILR 2172). The IC failed to consider the following evidence that demonstrated the impropriety of the Perwira account: (1) the deviation from past practice in the opening of the Perwira account; (2) the respondents' failure to adduce evidence to support their claim that the impugned resolution was forwarded to Singapore; (3) the admission by Nadiah in cross-examination that there was no documentary proof that the impugned resolution was forwarded to Singapore; (4) the concession by Yong in cross-examination that he was unsure if the impugned resolution was forwarded to Singapore; (5) the firm stand of Sng (Singapore director) that the impugned resolution was passed without his consent; and (6) the attempt by the respondents to conceal the existence of the Perwira account by failing and or refusing to disclose the cheque books and butts of the Perwira account when they handed over the belongings of the company to the appellant, which non-disclosure was admitted by Nadiah in cross-examination. The High Court correctly concluded that the respondents opened and operated the Perwira account without authorisation. The Court of Appeal was plainly wrong in its finding that the charges against the respondents did not amount to misconduct.

SUBMISSION OF THE RESPONDENTS

[11] Learned counsel for the respondents submitted that a reference under s 20(3) of the Industrial Relations Act 1967 ('the IRA') is not an action and therefore does not require the sanction of the DGI (learned counsel cited *Tanjong Puteri Golf Resort Bhd v John Supatever* [2001] 3 ILR 176, *Best Engineering Services & Trading v Beh Sun Sun* [2004] 3 ILR 444, *Cisco (M) Sdn*

Bhd v K Supramaniam [2002] 1 ILR 881, *Hercules Engineering (SEA) Sdn Bhd v Cheah Khee How* [2006] 4 ILR 2308, *KEB Designers & Producers Sdn Bhd & Anor v Ong Ming Huat* [2000] 1 ILR 46 and *NA Classic Sdn Bhd v Julkarnain Pauji* [1999] 2 ILR 186). The right to bring or pursue a claim for wrongful dismissal is not property vested in the trustee in bankruptcy (counsel cited *Grady v HM Prison Service* [2003] EWCA Civ 527 and *Khan v Trident Safeguards Ltd and others* [2004] EWCA Civ 624). In both *Grady* and *Khan*, the Court of Appeal held that the Employment Appeal Tribunal had jurisdiction to hear the employee's appeal, although the employee was a bankrupt. 'All appeals that flow do not attract 38(1)(a)'. 'No leave was required by either party'. Since reinstatement was sought, no leave was required. Leave is required only if compensation were sought (counsel cited *Ho Ken Seng v Progressive Insurance Sdn Bhd* [2013] 2 MLJ 335; [2013] 2 AMR 109 at p 128). Sanction is not required in employment cases. On 8 July 2014, the respondents applied for sanction as a matter of precaution. Subsequent sanction ratified the locus standi. In *Re Saunders (a bankrupt); Re Bearman (a bankrupt)* [1997] 3 All ER 992, Lindsay J held that the late giving of leave to proceed against a bankrupt does not make the proceeding a nullity.

[12] Pertinent to the second 'question of law', the written submission of the respondents contended that the issue raised by the second question was whether the opening of the Perwira account was justified by article 90. But the interpretation of article 90 was not pleaded by the appellant as an issue before the IC. Article 90 was only referred to by the respondents during cross-examination to defend the opening of the Perwira account. 'That was the reason why the Industrial Court referred to Article 90 in its award when arriving at the finding whether the Respondents' act of opening the account without the other directors' resolution tantamount to CBT'. At no point in time was the IC invited by the appellant to interpret article 90. Parties are bound by their pleadings (learned counsel cited *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1). The IC accepted the respondents' explanation that the opening of the Perwira account was to prevent the majority shareholder from transferring all funds to Singapore and leaving no funds locally. The respondents notified the Singapore directors of the opening of the Perwira account. The IC also accepted the respondents' explanation that the impugned resolution was forwarded to Singapore. The IC held that the opening of the Perwira account was not criminal breach of trust ('CBT'), and that the respondents had deposited all payments received into the Perwira account and that all payments remained intact in the account. The second 'question of law', which touched on findings of fact of the IC, should not be answered.

[13] As for the third 'question of law', the written submission of the respondents contended that the issue raised by the third question was 'whether

the absence of any allegation of any form of criminal conduct on the facts and circumstances of this case taken objectively will not qualify as a misconduct warranting conclude that the absence of an allegation of criminal conduct will not qualify as misconduct'. It was only in the context of the show cause letter that the Court of Appeal observed that the respondents were also directors of the company and that the 'show cause letter per se does not alleged any form of criminal conduct such as misappropriation to fall within the definition of misconduct'. It was not mentioned in the show cause letters that the respondents as directors misappropriated the monies of the appellant or committed criminal breach of trust, even though it was contended by the appellant at the IC that the respondents committed CBT. The Court of Appeal merely made that observation which was not the ratio of its decision. What amounts to misconduct must be determined on its own facts. 'The IC found that the Appellant failed to prove ... that the Respondents had dishonestly misappropriated or converted to their own use the company's property or had dishonestly used or disposed off that property. In short, the IC found that the company's allegations against the Respondents on the CBT were entirely baseless'. 'The IC found that the Appellant was not honest with its case and came to court with unclean hands'. The Court of Appeal upheld the findings of the IC. The Court of Appeal held that the law does not permit the High Court in a judicial review to substitute the findings of the IC.

REPLY SUBMISSIONS

[14] Learned counsel for the appellant replied that there were industrial cases which held that sanction is required (counsel cited *Alimahton Aridan v Bata Marketing Sdn Bhd* [2013] 2 LNS 1115, *Multicore Solders (Malaysia) Sdn Bhd v Donny Yeo Kuei Chwan* [2004] 1 ILR 1292, *Soo Ee & Co Sdn Bhd v Ang Chin Suan* [1997] 3 ILR 62, *Malayan Banking Bhd v Mohd Bahari bin Mohd Jamli @ Mohd Jamal* [2003] 4 MLJ 432, *Azian Othman lwn Roda Istimewa Sdn Bhd* [2010] 2 LNS 1552, *Tan Kim Chua v Rockhill Sdn Bhd* [2009] 2 LNS 0286, *Mashkon Hj Samuri v Orang Kampung Holdings (M) Sdn Bhd* [2008] 2 LNS 0894 and *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304). The underlying rationale for sanction is that the property and assets of a bankrupt vest in the DGI. The respondents' claim for reinstatement, which could only result in the award of monetary compensation, vested in the DGI. The alleged purpose of and reason for the Perwira account was irrelevant to the second 'question of law' which targeted the authority of the respondents to operate the Perwira account.

[15] Learned counsel for the respondents maintained that sanction is not required in employment cases. *Krishan Murari Lal Sehgal v State of Punjab* was not a case on sanction in bankruptcy. The award sum is now held by the DGI who is not objecting to the appeal being lodged without previous sanction. The Court of Appeal did not decide that conduct must be criminal in order to

amount to misconduct. The Court of Appeal was correct to refer to *Tan Poh Thiam v Industrial Court of Malaysia* [2015] MLJU 974 which set out the industrial law jurisprudence on misconduct.

OUR DECISION

First 'question of law'

[16] On the making of a bankruptcy order, 'all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt' (s 8(1)(b) of the Insolvency Act 1967 ('the Act') (the former Bankruptcy Act 1967). Since all property of the bankrupt shall vest with the DGI, 'where a bankrupt has not obtained his discharge, the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency' (s 38(1)(a) of the Act). '... the words 'maintain any action' ... are wide enough to cover both the bringing or continuing of an action already brought' (*K Ismail Ganey Rowther and company first defendant v MA Abdul Kader, the official assignee of the property of KP Peer Mohamed, a bankrupt* [1933] 2 MLJ 98 per Thorne Ag CJ (Prichard and Gerahty JJ in agreement) on s 33(i)(a) of the Bankruptcy Enactment 1912, 'which section was virtually identical to s 38(1)(a) of the Act' (*Goh Eng Hwa v M/s Laksamana Realty Sdn Bhd* per Abdul Aziz Mohamad JCA, as he then was).

[17] Section 3 of the Courts of Judicature Act 1964 ('the CJA') defines 'action' as 'a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding'. The Act itself does not define 'action'. In *Re Chua Tin Hong, ex p Castrol (M) Sdn Bhd* [1996] MLJU 608; [1997] 3 CLJ SUPP 174, it was held that the plain meaning of 'action' is civil action. That judicial definition of 'action' was refined in *Ho Ken Seng v Progressive Insurance Sdn Bhd*, where the Federal Court per Richard Malanjum CJ (Sabah and Sarawak), delivering the judgment of the court, said that the word 'action' does not apply to the action upon which the bankruptcy was secured.

[18] In *Ho Ken Seng v Progressive Insurance Sdn Bhd*, the respondent, who had obtained judgment against the appellant, served a bankruptcy notice followed by a bankruptcy petition on the appellant. The appellant applied to strike out or set aside the bankruptcy notice and bankruptcy petition. The senior assistant registrar dismissed the application with costs. The appellant appealed to judge in chambers. Meantime, the respondent obtained a receiving order and adjudication order ('RO' and 'AO') against the appellant. The

appellant appealed to judge in chambers against the grant of RO and AO. Both appeals to judge in chambers were dismissed. The appellant appealed to the Court of Appeal. The respondent filed a notice of motion to strike out the notice of appeal on the ground that the appellant had no locus standi to pursue the appeal by reason of s 38(1)(a) of the Act. By a majority, the Court of Appeal allowed the application to strike out the notice of appeal; it was held that the steps taken by the bankrupt in filing and prosecuting these two appeals came within the ambit of an action that required the previous sanction of the DGI. The minority judgment followed *Re Khoo Kim Hock* [1974] 2 MLJ 29, where it was held by Azmi J, as he then was, 'that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction'.

[19] The Federal Court noted that divergent views were also expressed in *Bathamani a/p Suppiah v Southern Finance Co Bhd* [2000] 6 MLJ 427 and *Re Lim Tai Nian; ex p Kewangan Utama Bhd* [2001] 4 MLJ 78 on the requirement of the previous sanction of the DGI, to challenge an order in bankruptcy. To settle the divergent views, the Federal Court unequivocally held that the sanction requirement does not apply to a proceeding or appeal challenging an order in bankruptcy, and that the word 'action' refers to a new action and not the action upon which bankruptcy was secured:

> [26] Having read and reread the two judgments and having given them our careful and anxious consideration we are inclined to agree with the reasoning of the learned judge in *Re Lim Tai Nian ex p Kewangan Utama Bhd*. We therefore rule that the decisions in *Re Low Kok Tuan ex parte Arab Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185, *Bathamani a/p Suppiah v Southern Finance Co Bhd* [2000] 6 MLJ 427; [2000] 2 CLJ 650 and such other cases that followed them are no longer the law and we overrule them.
>
> [27] In addition, in our view s 38(1)(a) should not be given too extensive an interpretation.
>
> [28] While we agree that the word 'action' therein should refer to civil action or civil proceeding in court (see *Re Chua Tin Hong Ex parte Castrol (M) Sdn Bhd* [1997] 3 CLJ Supp 174), it should be restricted to a new and separate action and not the same upon which the bankruptcy was secured. And we would think that the scope of s 38(1)(a), other than the saving clause therein, should be limited to a new chose in action that could affect the assets or proprietary rights of a bankrupt intended for distribution to his creditors (see: *Boaler v Power* [1910] 2 KB 229).

[20] Sanction is not required to challenge an order in bankruptcy. But where s 38(1)(a) applies, an undischarged bankrupt must obtain the previous sanction of the DGI to institute a claim (*Dato' Kuah Tian Nam v Tan Wrun Peng* [2009] 9 MLJ 464), file a counterclaim (*Goh Eng Hwa v M/s Laksamana Realty Sdn Bhd* per Abdul Hamid Mohamad FCJ, as he then was), defend an

action (*Kesang Leasing Sdn Bhd v Dato' Hj Mat @ Mat Shah bin Ahmad & Ors* [2009] 7 MLJ 305), maintain the action and continue with the case (*Priyakumary Muthucumaru & Anor v Gunasingam a/l Ramasingam (a bankrupt)* [2006] 6 MLJ 511), 'commence an action by writ or by any of the mode provided in O 5 r 1' (*Bankruptcy Law in Malaysia and Singapore* by GK Ganesan at p 547) or file an appeal (*Amos William Dawe v Development & Commercial Bank (Ltd) Berhad*; see also *Owens v Comlaw (No 62) Pty Ltd & Ors* [2006] VSCA 151 at para [42], where on s 60(2) of the Bankruptcy Act 1966 which operates to stay an action which is on foot at the time when a person is made bankrupt until the trustee makes an election to prosecute or discontinue the same and on s 60(5) of the Bankruptcy Act 1966 which defines 'action' as 'any civil proceeding whether at law or in equity', Ashley JA (Redlich JA in agreement) said that 'action is apt to include an appeal', and, *Joseph Patrick Cummings v Claremont Petroleum NL and anor* (1996) 137 ALR 1, where on the same said s 60(2) and (5) of the Bankruptcy Act 1966, Brennan CJ, (Gaudron and McHugh JJ in agreement) said 'The institution of an appeal by a defendant against a judgment in favour of a plaintiff is the commencing of a proceeding. That follows from the decision of the Full Court of the Supreme Court of New South Wales in *Want v Moss*').

[21] Only previous sanction will do. Subsequent sanction, which is not previous sanction, could not change the fact that the undischarged bankrupt was not competent to institute, maintain or defend the action at the material time. But previous sanction is not always required. Not everything vests in the DGI. Where not vested in the DGI, an undischarged bankrupt is not caught by s 38(1)(a). On that, we do not subscribe to the view expressed by the Singapore Court of Appeal in *Standard Chartered Bank v Loh Chong Yong Thomas* at paras [30] and [32] per VK Rajah JCA, delivering the judgment of the court, that an action for 'property' which does not vest in the assignees, still require the previous sanction coupled with assignment of the 'property' by the assignees.

[22] 'Property' that vests in the DGI 'includes money, goods, things in action, land and every description of property, whether real or personal and whether situate in Malaysia or elsewhere; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined' (s 2 of the Act). In *Ord v Upton* [2000] Ch 352, Aldous J observed that s 436 of the English Insolvency Act 1986 (which is almost identical to the definition of 'property' in s 2 of the Act) only sets out what is included. As to whether causes of action are 'things in action', in *Heath v Tang and another; Stevens v Peacock and others* [1993] 4 All ER 694, Hoffman LJ stated 'the property which vests in the trustee includes 'things in action'. Despite the breadth of the definition, there are certain causes of action personal to the bankrupt which do not vest in

his trustee'. In *Bailey v Thurston & Co, Limited* [1903] 1 KB 137, Cozens-Hardy LJ said that unexecuted contracts for purely personal service do not vest in the trustee and that with respect to future services, a bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation:

> It has been established for many years that, notwithstanding the generality of the language used in the Bankruptcy Acts, there are some contracts and some rights that do not vest in the trustee. For the present purpose it is sufficient to mention contracts for purely personal service. Such unexecuted contracts are not assignable by deed, and they are not, by virtue of the statute, vested in the trustee. If, however, at the date of the bankruptcy a sum of money is due in respect of services rendered under the contract, the trustee and not the bankrupt will take the money. But as to future services, the bankrupt can sue for his remuneration under the contract, subject only to the right of the trustee to intervene and claim the fruits of the litigation. It is clear that the plaintiff's contract of service did not pass to the trustee. The plaintiff continued to act as traveller for the defendants after the bankruptcy. The judgment of the Exchequer Chamber in *Drake v Beckham* (1) and the opinions of the judges who advised the House of Lords in that case (2) place this matter beyond doubt. Further, there was not at the date of the bankruptcy any accrued right of action under the contract which might have vested in the trustee as in *Beckham v Drake*. (2) So far as I am aware, there is no authority inconsistent with the view that I have expressed; and I think that the decision of the learned judge was right, and that this appeal fails.

[23] In *Beckham v Drake* (1849) 2 HL Cas 579, the plaintiff brought an action on a contract for hiring and service, where the plaintiff was to serve for seven years. The contract provided for a penalty of £500 for non-performance. The plaintiff was dismissed during the seven years. The plaintiff, after this breach, and before the commencement of the action to recover the penalty of £500, became bankrupt; the question was, whether this cause of action passed to his assignees. The Court of Exchequer of Pleas gave judgment to the plaintiff. The Court of Exchequer Chamber reversed the decision of the Court of Exchequer of Pleas. At the Court of Error, the question was whether the right of action against the defendant did or did not pass to the assignees. Two judges (Rolfe B and Platt B) gave an opinion that it did not pass. Seven judges (V Williams J, Erle J, Creswell J, Wightman J, Maule J, Parke B and Lord Chief Justice Wilde) gave an opinion that it passed. It was a claim for the contractual penalty, and it was the majority opinion of the Court of Error that at the date of the bankruptcy, the right of action under the contract for a pure monetary sum vested in the trustee. The House of Lords agreed with the majority opinion.

[24] But of far greater importance than the result which turned on the facts was the exposition, the following, by the judges of the Court of Error on what

passes to assignees, and who has the right, undischarged bankrupt or assignee, to bring action for breach of executed/unexecuted contracts of purely personal service:

> Mr Justice V Williams: 'The right of action on which the plaintiff below has declared is founded upon a breach of contract incurred before the time of bankruptcy, and consequently it can hardly be disputed that it formed a part of the personal estate of the bankrupt … [in contrast to an executor] an assignee takes only those beneficial matters belonging to the bankrupt's estate which may be applied for the purpose of distribution amongst his creditors … It certainly has been established by a series of authorities, ending with the case of *Rogers v Spence* in this House that no action can be maintained, either by an executor or by an assignee, to recover damages for bodily or mental sufferings or personal inconvenience sustained by the deceased or by the bankrupt … it cannot be doubted that where a contracts remains to be executed, and cannot be executed without the cooperation of the bankrupt, his assignees cannot enforce the contract, at all events unless they can procure him to cooperate. But this doctrine seems to have no application to a case like the present, where, at the time of the bankruptcy, the breach of contract had already occurred, and consequently, whether the action for damages in respect of that breach is brought by the bankrupt himself or by his assignees, he is not bound by the contract to bestow any of his skill or labour in order to sustain the right of action …'.
>
> Mr Baron Platt: 'If at that time of the bankruptcy the consideration had been executed, and the right of the bankrupt had been to recover remuneration for past services, or if he had recovered a judgment in an action brought to recover damages for the breach in respect of which he seeks to recover in the present action, the remuneration and judgment would have passed as debts to the assignees. But in this case …'.
>
> Mr Justice Erle: 'The general principle is, that all rights of the bankrupt which can be exercised beneficially for the creditors do so pass and the right to recover damages may pass though they are unliquidated. This principle is subject to exception. The right of action does not pass where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property. Thus it has been laid down that the assignees cannot sue for breach of promise of marriage, for criminal conversation, seduction, defamation, battery, injury to the person by negligence, as by not carrying safely, not curing, not saving from imprisonment by process of law; also the right of action does not pass in respect of wages earned by the bankrupt upon a hiring after the bankruptcy; also the right of action cannot be made to pass to the assignees in respect of contracts uncompleted at the time of the bankruptcy, by their adoption and completion thereof, where the personal service of the bankrupt himself is of the essence of the contract …'.
>
> Mr Justice Creswell: 'The case of *Chippendale v Tomlinson* … does not appear to me to have any bearing on this question. That was a case by a bankrupt for his work and labour done after the bankruptcy. I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees; they cannot hire him out (as was said by Lord Mansfield), and, as a consequence, the assignees cannot, after bankruptcy, adopt and enforce a contract made before the bankruptcy; for the

application of the personal skill or labour of a bankrupt; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees ...'.

Mr Justice Wrightman: '... all the present and future personal estate of the bankrupt, and all the debts due to him pass to the assignees ... There are, however, exceptions to the generality of the right of the assignees. In cases where the personal estate is only affected through some wrong or injury to the person or the feelings of the bankrupt ... the right of action would not pass to the assignees. Rights of action for breach of promise to marry, for torts to the person, for libel or slander, are instances of exceptions to the general rule. It may be also that the right to enforce unexecuted contracts will only pass to the assignees in cases where the assignees themselves could perform that which the bankrupt himself was to perform ...'.

Mr Baron Parke: 'The assignee is created by statute ... and takes only what the statute gives ... What then does it give? It clearly gives ... not merely all personal chattels, securities for money, and debts properly so called, but all unexecuted contracts which the assignee could perform ... On the other hand, actions for the breach of contracts personal to the bankrupt ... are certainly not assigned ...'.

Lord Chief Justice Wilde: '... a right of action to recover damages for the breach of a contract, which has accrued to a bankrupt before the bankruptcy, is part of the personal estate of such bankrupt within the meaning of the statutes in bankruptcy and will in many cases pass to the assignees ... It is to be observed that at the time of the bankruptcy the contract was not *in fieri*; the performance of it was no longer a matter open between the parties, but had been determined by the actual dismissal ... the only open point between them at that time was the right of the plaintiff to recover damages for the previous breach of the contract ... the question whether a right of action, actually vested in the bankrupt prior to the bankruptcy, in respect of a contract determined, passes to the assignees ...'.

[25] Insofar as they bear upon the facts of the instant case, *Beckham v Drake* was clear that the right of action for breach that occurred before bankruptcy of an executed contract, of a contract not *in fieri*, passes to the assignees; the right of action for breach that occurred before bankruptcy of an unexecuted contract also passes to the assignees where the unexecuted contract could be executed by the assignees without the cooperation of the undischarged bankrupt; however, the right of action for breach that occurred before bankruptcy of an unexecuted contract remains with the undischarged bankrupt where the personal service of the undischarged bankrupt is of the essence of the unexecuted contract.

[26] In *Bailey v Thurston & Co, Limited*, the defendants agreed to employ the plaintiff, and he agreed to serve them, as their traveller for a period of five years from April 17, 1899. Early in June 1901, the plaintiff was adjudicated bankrupt, and on the 29th of the same month the defendants dismissed him from their employment, and he thereupon brought an action for wrongful dismissal, being then an undischarged bankrupt, and recovered 100*l*. The

defendants pleaded that the plaintiff was adjudicated a bankrupt before the action was brought, and was an undischarged bankrupt when it was brought; and that the trustee was not a party to the action, and that, in consequence, the action was not maintainable. The question was whether that is a good defence, or, in other words, whether the action could be maintained by the plaintiff in his own name. Collins MR (Stirling LJ in agreement) held that where contract for personal service was in fieri and still unperformed, an undischarged bankrupt could bring the action:

> In case of the breach of such a contract as existed in the present case, complete at the date of the bankruptcy, and sounding in a money claim, there is no doubt that the right of action would pass to the trustee, and that he would be the proper person to sue. But so far as the contract for personal service was in fieri and still unperformed, it seems to me to be clear upon consideration of *Beckham v Drake* (1) that an action for breach of contract would not belong to the class of actions which the trustee could claim the right to bring as assignee of the property of the bankrupt. Whatever claim he might have to the proceeds of such an action, he could not put in suit in his own right a contract which was still in fieri, and in respect of which it would be necessary to allege that the bankrupt was always ready and willing to perform his part. This view is very clearly stated in the opinions of the learned judges given at the hearing of *Beckham v Drake* (1) in the House of Lords. I take, for example, a passage from the opinion of Cresswell J at p 615 of the report, which seems to me to put in a concrete form that which was said by several of the judges. The passage is this: 'I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees; they cannot hire him out (as was said by Lord Mansfield), and, as a consequence, the assignees cannot, after bankruptcy, adopt and enforce a contract made before the bankruptcy, for the application of the personal skill or labour of a bankrupt; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees'. There is also a passage from the opinion of Parke B at p 625 of the report to the same effect: 'The contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed'. It may be observed that the contract under consideration in that case was very similar to that in the present case, for there was an agreement to employ the appellant for a term of years at a salary; and the action was for breach of that contract by dismissing the appellant before the expiration of the term. That breach, however, occurred before the bankruptcy, and the House of Lords held that the right of action for that breach passed to the assignee. The conclusion from the passages that I have cited is that there is no justification for the contention that this contract with all its incidents passed to the trustee. The cause of action for the wrongful dismissal of the plaintiff arose after his bankruptcy, and that, in the opinion of the learned judges, was a cause of action in respect of which the plaintiff could sue. There is a well-known principle in regard to rights accruing to the bankrupt after the bankruptcy and in respect of his personal services that, though the bankrupt is the proper person to sue in such a case, the trustee may intervene and take the proceeds of the action except in so far as they are necessary for the bankrupt's maintenance. The questions whether the trustee can

intervene in the action, and whether the bankrupt can maintain the action, are distinct, and the latter is the only one for our decision here, and, on the authorities that I have cited, the decision of the learned judge must be supported.

[27] Where *Beckham v Drake* only implied that whether the cause of action for wrongful dismissal arose before or after bankruptcy is material, Collins MR was explicit on the before or after bankruptcy point: 'The cause of action for the wrongful dismissal of the plaintiff arose after his bankruptcy, and that, in the opinion of the learned judges, was a cause of action in respect of which the plaintiff could sue'. Thus, where dismissal was after bankruptcy, an undischarged bankrupt is competent to sue.

[28] *Cheshire, Fifoot & Furmston's Law of Contract* (16th Ed) at p 663 put the position as follows:

> If a bankrupt has made a contract for personal services, the question whether his right to sue for its breach remains with him or passes to his trustee depends upon the date of breach. If the breach occurs before the commencement of the bankruptcy, the right of action passes to the trustee; if it occurs after this date the right of action remains with the bankrupt, subject to the power of the trustee to intervene and to retain out of the sum covered what is not required for the maintenance of the bankrupt and his family. Thus the person entitled to recover damages against an employer for the wrongful dismissal of the bankrupt varies according as the dismissal occurs before or after the bankruptcy.

[29] The following authoritative commentaries, from both the past and present, also made such distinction between a wrongful dismissal being before or after bankruptcy:

> Right of action for breach of contract for personal service. — The right of action for breach of a contract, even if it be one requiring the personal skill of the insolvent, passes to the Official Assignee or Receiver where the breach has occurred before insolvency, and money is recoverable by the insolvent as damages for the breach. Thus where a foreman engaged for a firm of type-founders for a term of seven years was dismissed before the expiration of the term and he was afterwards adjudged bankrupt, it was held that the trustee in bankruptcy, and not the foreman, was entitled to sue for damages for wrongful dismissal. Similarly, where an agent employed to sell a property negotiates the sale before his insolvency, but the remuneration for his services is to be paid on completion of the sale, the Official Assignee or Receiver is entitled to the remuneration though the sale is not completed until after his discharge. If, however, the contract is unexecuted at the date of the insolvency, and the breach occurs after the insolvency, the right of action does not vest in the Official Assignee or Receiver, but remains in the insolvent who can sue in respect of it. Thus an undischarged insolvent employed as a travelling agent for a firm under a contract made before the commencement of the insolvency can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the insolvency, but the Official Assignee or Receiver, being

entitled to the fruits of litigation, is entitled to intervene, and the court may on his application add him as a plaintiff in the suit. The reason why the right of action does not vest in the Official Assignee or Receiver is that if a contract for personal service entered into before insolvency remains unexecuted at the date of insolvency, the insolvent cannot be compelled to complete it for the benefit of his creditors (*The Law of Insolvency in India* by DF Mulla 2nd Edition, 1958 Publication).

Contracts for personal services. Where the bankrupt's personal skill and labour are the basis of a contract, the right of action for breach of the contract passes to the trustee (1) where the breach has occurred before the bankruptcy, and money is recoverable by the bankrupt as damages for the breach; or (2) where the bankrupt has completed the contract during the bankruptcy and money on the contract has become due, and the trustee has claimed the money on behalf of the bankrupt's estate, or has obtained an income payments order in respect of it, or which includes it. Otherwise the right to sue for money recoverable as damages for a breach of the contract occurring after the commencement of the bankruptcy may be exercised by the bankrupt and he may retain the amount recovered subject to his notifying the trustee as to its recovery and amount. The trustee may then claim the damages for the bankrupt's estate, except in so far as such damages are required for meeting the reasonable domestic needs of the bankrupt and his family (*Halsbury's Laws of England* (4th Ed Reissue Vol 3(2)) at para 426, 1989 Publication).

Contracts for personal services. Where the bankrupt's personal skill and labour are the basis of a contract, the right of action for breach of the contract passes to the trustee:

(1) where the breach has occurred before the bankruptcy, and money is recoverable by the bankrupt as damages for the breach; or

(2) where the bankrupt has completed the contract during the bankruptcy and money on the contract has become due, and the trustee has claimed the money on behalf of the bankrupt's estate, or has obtained an income payments order in respect of it, or which includes it.

Otherwise the right to sue for money recoverable as damages for a breach of the contract occurring after the commencement of the bankruptcy may be exercised by the bankrupt and he may retain the amount recovered subject to his notifying the trustee as to its recovery and amount. The trustee may then claim the damages for the bankrupt's estate, except in so far as such damages are required for meeting the reasonable domestic needs of the bankrupt and his family' (*Halsbury's Laws of England* (5th Ed Vol 5) at para 450, 2013 Publication).

[30] But the distinction between dismissal before or after bankruptcy was apparently not relevant in the following cases at the employment tribunal, where the employee sought reinstatement. In both cases, the employee was dismissed before bankruptcy. And in both cases, the English Court of Appeal held that the employee was competent to bring the proceedings against the employer.

[31] In *Grady v HM Prison Service*, Grady made complaints of unfair

dismissal, breach of contract, wrongful dismissal and disability discrimination against her employer, the Prison Service. By a decision promulgated on 14 November 2001 the employment tribunal struck out the claims under rr 4(8) and 15(2)(d) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. Grady appealed to the Employment Appeal Tribunal ('EAT'), by notice of appeal dated 21 December 2001. At the appeal hearing, the employer was permitted to take the point, that, since the applicant had been adjudged bankrupt on 31 January 2002, she had no standing because her entitlement to bring the relevant proceedings had vested in her trustee in bankruptcy, who had made no assignment and was not prosecuting the case himself. The tribunal acceded to the submission that Grady did not have standing to bring the proceedings and that the tribunal had no jurisdiction to hear it. But on further appeal to the Court of Appeal, it was held by Sedley LJ, giving the judgment of the court, that a claim for unfair dismissal is personal not proprietary, and not a thing in action of the kind which forms part of the estate of a bankrupt:

> 21 It seems to us that the upshot of the many decided cases on this topic is that a claim which represents a transmissible asset of the bankrupt forms part of the estate on which the creditors have a claim, while one which reflects some aspect of the bankrupt's individuality does not. This is not to say that the end product of the latter is also protected. Just as an investment of, say, libel damages will accrue to the estate and vest in the trustee (see paragraph 11 above), one would expect that earnings beyond those needed for subsistence from a job in which the bankrupt was reinstated would form part of the estate, as those from a bankrupt's continuing employment do.
>
> 22 In our judgment the essential nature of a claim for unfair dismissal is personal, not proprietary. Unlike a claim for wrongful dismissal, which (except in the rare case where specific performance can be granted) is an action for damages for breach of a contract, a claim for unfair dismissal only begins with the employer's fundamental breach. It proceeds through the issues described in paraphrase in paragraphs 6 and 7 above. The purpose and effect of the sequential provisions for judgment and redress can fairly be said to be the recognition of a vested interest in a job — something of a different order from the common law's view of a job as a simple contract which can be broken by a party willing to pay the appropriate price for breach.
>
> 25 In our judgment a claim for reinstatement or re- engagement consequent on an unfair dismissal, and indeed a significant element of the compensation which can be awarded in lieu of these, is not a thing in action of the kind which forms part of a bankrupt's estate, even though the eventual fund (if an award is made) may be. It is a claim of a unique kind which offers the restoration to the claimant of something which only the claimant can do. To vest it in the trustee in bankruptcy would be of no appreciable benefit to the creditors except to the extent that it might produce a money settlement (which would represent not a concession but a liquidation of the bankrupt's claim to her job). For the rest, the creditors will probably be better served if the bankrupt can get her job back or a similar job in its place, and that is

something the trustee cannot do in her stead. Mr Johnson rightly did not fall back on the circular proposition that in that case the trustee can always reassign the claim to the bankrupt.

26 The appeal tribunal, ante, pp 756–757, took the view that the difference between wrongful and unfair dismissal being chiefly one of remedies, and orders for re-engagement and reinstatement being 'very rare' (we do not in fact know the figures), there was no sufficient difference between the two to indicate a differential effect of bankruptcy. They concluded that in the light of the authorities a right to claim unfair dismissal was a property right and not a personal right.

27 For reasons which we have given we respectfully take the contrary view. We consider that an unfair dismissal claim, both in its nature and in its remedies, is personal to the claimant and not apt to vest in her trustee in bankruptcy as a thing in action.

[32] In *Khan v Trident Safeguards Ltd and others*, Khan brought three appeals in the EAT from decisions of employment tribunals which had dismissed, in the first appeal, his complaints of race discrimination and victimisation made against his employer and four of its senior employees, in the second appeal, complaints of race discrimination and victimisation made against his employer and others, and, in the third appeal, his complaint of unfair dismissal. While the appeals were pending, Khan was adjudged bankrupt on his own petition, following orders for costs made against him by the employment tribunals, and remained bankrupt when the EAT heard the appeals. The EAT dismissed all three appeals on the basis that pursuant to ss 306, 283(1) and 436 of the Insolvency Act 1986, on his bankruptcy the applicant's claims vested in the trustee in bankruptcy and he, accordingly, lacked standing to continue them. On appeal to the Court of Appeal, Wall LJ concluded that the claims relating to race discrimination and victimisation vest in the official receiver, and that only the third appeal, which had to do with the complaint of unfair dismissal, should be remitted to the EAT for hearing. Buxton and Arden LJJ took the view that Khan had capacity to prosecute all three appeals. Notwithstanding disagreement on the first and second appeals, the Court of Appeal was nonetheless unanimous that Khan had capacity to prosecute his claim of unfair dismissal.

[33] In New Zealand, the remedy of reinstatement is not 'property' that vests in the official assignee (*Young v Plenty District Health Board (No 2)* (2013) 11 NZERL 478 at para [52]). In the latter case, the plaintiff was dismissed in 2008 and adjudged bankrupt in 2012. Whilst his personal grievance was before the court, on 6 May 2013, the official assignee filed a 'notice of discontinuance'. The issue was whether the official assignee could discontinue the plaintiff's claim for reinstatement. The official assignee conceded that the plaintiff's claim for reinstatement and those of non-pecuniary loss or damages were of a personal nature and remained with the bankrupt. The official assignee however

A contended that the claims for arrears of wages, interest and costs vested with the assignee. Colgan CJ held that 'the remedy of reinstatement is not property' and that the claim could not be discontinued by the official assignee. The fact that the plaintiff was dismissed before bankruptcy was disregarded. Incidentally, Colgan CJ cited Australian and Canadian cases which also illustrated that in
B employment related claims, the before or after bankruptcy point is an irrelevance.

[34] We should answer the first 'question of law' in the following terms. The
C distinction between a breach that occurred before or after bankruptcy is still good law (see, for example, *Chin Kon Nam & Anor v Chai Yun Phin Development Sdn Bhd* [1996] 4 MLJ 271, where the cause of action for breach of contract arose before bankruptcy, and Abdul Kadir Sulaiman J, as he then was, held that the cause of action vested in the official assignee and that
D s 38(1)(a) applied to the plaintiff). But that distinction is not relevant, or no longer relevant, in employment related actions. A proceeding under s 20(3) of the IRA, a personal claim (see *Thein Tham Sang v United States Army Medical Research Unit & Anor* [1983] 2 MLJ 49; [1983] 1 CLJ 240), does not require the previous sanction of the DGI. We prospectively overrule all cases that held
E to the contrary and all cases that followed them. A challenge of an order in bankruptcy does not require the previous sanction of the DGI. An undischarged bankrupt could appeal against an order in bankruptcy to judge, Court of Appeal or even, with leave, to this court, without the previous sanction of the DGI. That is because such appeal is a continuation of the
F challenge to the order in bankruptcy. A proceeding under s 20(3) of the IRA does not require sanction. Since judicial review of an award under s 20(3) of the IRA and consequential appeals are also in continuation of the challenge to the award, they should also not require the previous sanction of the DGI. The respondents were competent to lodge their appeals at the Court of Appeal.

G

Second and third 'questions of law'

[35] Before we answer the second and third 'questions of law', we need to clear the air with respect to the findings of the IC and the High Court.

H

[36] Learned counsel for the appellant contended: (1) that the IC held that the Perwira account was opened in accordance with article 90; (2) that the High Court disagreed with that finding; (3) that the High Court held that the IC failed to consider the respondents' failure to follow the practice of the
I company; and (4) that the High Court correctly concluded that the respondents opened and operated the Perwira account without authorisation. Learned counsel for the respondents contended: (1) that the IC accepted the respondents' explanation that the opening of the Perwira account was to prevent the majority shareholder from transferring all funds to Singapore and

leaving no funds locally; (2) that the IC accepted the respondents' explanation that the impugned resolution was forwarded to Singapore; (3) that the IC held that the opening of the Perwira account was not criminal breach of trust; and (4) that the IC held that the respondents had deposited all payments received into the Perwira account and that all payments remained intact in the account. The Court of Appeal held that the IC accepted the version of the respondents.

[37] But with respect to both learned counsel and the Court of Appeal, we could not uncover the finding or findings by the IC or High Court as contended. More than once we have combed through the award and the judgment of the High Court. But all we could find was the finding by the IC that the alleged misconduct, which according to the IC tantamounted to criminal breach of trust, was not proved. The IC summarised the testimony of the respondents and reproduced article 90 in the award. But there was no finding by the IC that the explanation of the respondents was ever accepted and or accepted on account of article 90. The IC invoked the adverse inference against the appellant. The IC held that CBT was not proved. Those were the only findings of the IC for its conclusion. Neither the explanation of the respondents nor article 90 was relied on by the IC in its deliberation. Nothing had turned on the explanation of the respondents, article 90 or past practice of the company. Since nothing had turned on article 90 or past practice of the company, there was no basis for the second 'question of law' to be asked or answered.

[38] The third 'question of law' was a legitimate question that should not be let passed.

[39] At para [41] of the award, the IC appreciated that the main allegation of misconduct against the respondents was that they opened and operated the Perwira account without the authority of the board of directors. Now given that that was the main allegation, the IC should have proceeded to determine: (i) whether the operation of the Perwira was without authority; and (ii) if without authority, then whether the operation of the Perwira account was misconduct that warranted dismissal (see *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 at p 136 per Raja Azlan Shah CJM (as HRH then was), delivering the judgment of the court). But that was not how the IC had gone about it. The approach of IC was that of a court sitting in judgment of a criminal charge and requiring the prosecution to prove CBT. First, at para [45] of the award, the IC asked whether the alleged misconduct amounted to CBT as defined in s 405 of the Penal Code. Secondly, at para [46] of the award, the IC held that 'the burden of proof was upon the company to prove that claimants' act of opening the current account tantamounted to CBT and accordingly that they were dismissed for just cause or excuse since the allegation of CBT is misconduct of a very grave and serious nature', that it was not proved

that the respondents 'failed to deposit the cheques', and that the respondents were not challenged 'that they had withdrawn any of the company's monies from the account for their own use which would have led to CBT'. And thirdly, at para [47] of the award, the IC held that it was not shown that the respondents 'had dishonestly misappropriated or converted to their own use the company's property or they had dishonestly used or disposed off that property'. At para [48] of the award, the IC invoked an adverse inference against the appellant for not calling Theu as a witness. The IC held that the alleged misconduct, which tantamounted to CBT, was not proved. Thereafter, the IC 'acquitted' the respondents without deliberation of the explanation, just exactly as a court sitting in judgment of a criminal prosecution would do, that is, acquit and discharge in the absence of a prima facie case.

[40] There could be no mistake about it; the IC held that the appellant must prove CBT to justify dismissal. The Court of Appeal also had the notion that only criminal conduct could justify dismissal. At para [6] of its judgment, the Court of Appeal said 'The central complaint against the first appellant as per the show cause letter dated 13 March 2000 is for alleged misconduct in jointly opening and operating with the second appellant, a current account at Perwira Affin Bank without the knowledge and authorisation of their employer TTEC. In consequence of purported non-reply to the show cause letter, the first respondent, by a letter dated 24 March 2000, terminated the service of the first appellant. *It is essential to note that the show cause letter per se does not allege any form of criminal conduct such as misappropriation, etc. more so when both the appellants were directors of TTEC, to fall within the definition of misconduct* (see *Tan Poh Thiam v Industrial Court of Malaysia* [2015] MLJU 974'. (Emphasis added.) At para [7] of its judgment, the *ipse dixit*, with respect, of the Court of Appeal was that 'based on decided cases (which we do not think it necessary to set out herein), the above complaint, taken objectively, will not qualify as a misconduct'. Learned counsel for the respondents submitted that it was not concluded by the Court of Appeal that the absence of an allegation of criminal conduct will not qualify as misconduct. But the Court of Appeal at paras [6] and [7] plainly said that '... the show cause letter per se does not allege any form of criminal conduct ... to fall within the definition of misconduct', and that therefore the complaint could not qualify as a misconduct. The Court of Appeal meant that it required nothing less than criminal conduct to justify dismissal. The Court of Appeal effectively held that misconduct in employment must amount to criminal conduct to justify dismissal. But with respect, the Court of Appeal could not be more wrong. We would not hazard to define misconduct in employment, as 'the acts which can constitute misconduct inside employment are too numerous to categorise' (*Selwyn's Law of Employment* (17th Ed) at 17.121). Suffice it to say, in answer to the third 'question of law, that misconduct inside employment need not amount to a crime to justify dismissal. We only need to cite two cases to illustrate that point.

[41] 'In *Laurie v Fairburn* IDS Brief 109, the claimant was dismissed because the employers believed that she was stealing from them. The employment tribunal was not convinced that this was so, and held the dismissal to be unfair. This was reversed on appeal; the question is not whether or not the employee was guilty, or would have been found guilty if tried, but whether it was reasonable for the employers to dismiss her, taking into account all the circumstances at the time of the dismissal' (*Selwyn's Law of Employment* (17th Ed) at 17.124). 'In *Da Costa v Optolis* [1977] IRLR 178 (EAT) the claimant was dismissed from his job as a book-keeper for not keeping his proper accounts, and he subsequently faced criminal charges though these ended in his favour. It was held that the fact that the Crown Court had acquitted him did not prelude a finding by the employment tribunal that the dismissal was fair. The issues involved were different. In the Crown Court, it had to be decided whether he was guilty of the charge beyond reasonable doubt, whereas in the employment tribunal, it had to be shown whether the employer had reasonable grounds for dismissing him' (*Selwyn's Law of Employment* at 17.127).

[42] As said, the IC appreciated that the main allegation of misconduct against the respondents was that they opened and operated the Perwira account without the authority of the board of directors. But yet, the IC did not consider or ruled on whether the operation of the Perwira account amounted to misconduct. Instead, the IC held that the complaint tantamounted to CBT which was not proved.

[43] The Court of Appeal said that 'the central complaint against the (first respondent) as per the show cause letter dated 13 March 2000 is for alleged misconduct in jointly opening and operating with the second appellant, a current account at Perwira Affin Bank without the knowledge and authorisation of their employer' and that 'in respect of the (second respondent), the show cause letter alleged that she had misconducted herself in the following manner: (i) by opening of a bank account without authorization in collaboration with appellant Yong Peng Kean; (ii) by gross dereliction of duties in failing to keep true and proper records of the company; (iii) by dereliction in duties in failing to promptly deposit payments of cheques made to the company'. At para [6] of its judgment, the Court of Appeal acknowledged that '... the show cause letter per se does not allege any form of criminal conduct ...' There was no allegation of criminal conduct. Yet the Court of Appeal required criminal conduct to justify dismissal.

[44] Could the award and or the judgment of the Court of Appeal therefore be upheld? In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, Eusoff Chin CJ said:

> The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regards to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s 30 of the Act) but it must follow the same general pattern ... The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion.

[45] In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:

> It is often said that judicial review is concerned not with the decision but the decision making process. (See eg Chief Constable of *North Wales Police v Evans* [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service* [1985] AC 374, where the impugned decision is flawed on the ground of procedural impropriety.
>
> But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance.
>
> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
>
> > By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality'

by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review. A

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. B

Lord Diplock also mentioned 'proportionality' as a possible fourth ground of review which called for development. C

[46] Edgar Joseph Jr FCJ also thus summarised the role of the High Court when excising supervisory jurisdiction:

The role of the High Court when exercising its supervisory jurisdiction on such instance as initially laid down in *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 and *Associated Provincial Picture Houses v Wednesbury Corp* [1948] 1 KB 223, has been explicitly spelled out in various judgments of our courts. I need only refer to the illuminating judgment of Jemuri Serjan SCJ (as he then was) in *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417 at pp 420–421 wherein he dealt with both the *Anisminic* and *Wednesbury* principles and in particular to the reproduction of Lord Reed's speech during which the following words appeared: D E

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases, the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. *It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.* (Emphasis added.) F G H

[47] The award of the IC could be reviewed for substance as well as for process. In the instant case, the IC had lost sight of the issue when it proceeded to adjudicate on CBT instead of misconduct in employment. And when it proceeded to adjudicate on CBT instead of misconduct in employment, the IC acted without jurisdiction, took into account an irrelevant matter, namely I

CBT, but failed to take into account the relevant matter of evidence of misconduct and the complaint. As said, the complaint was that the respondents opened and operated the Perwira account without the authority of the company. The respondents did not deny that they opened and operated the Perwira account and that they deposited the money of the company into the Perwira account. The respondents explained that they did so to prevent the transfer of the company's funds to Singapore. But it was not appreciated that what the respondents had done was to put funds of the company in their absolute control and beyond the reach of the company. The respondents might have been directors/minority shareholders of the company. But it was in their capacity as employees that the respondents had the day to day management of the company. And as employees with day to day management of the company, was it right for the respondents to put funds of the company in their absolute control and beyond the reach and control of the company? Would that behaviour not warrant dismissal? It must surely be that an employee who puts funds of his employer beyond the reach and control of his employer warrants dismissal. Any reasonable tribunal would find that the dismissal of the respondents was with just cause.

[48] The IC acted without jurisdiction, asked the wrong questions, applied the wrong law, utterly failed to rule on the alleged misconduct and explanation, and reached an irrational result. Though not for the same reasons, the High Court was nonetheless right to quash the award.

[49] For reasons herein, we unanimously allow these appeals, set aside the order of the Court of Appeal, and restore the order of the High Court.

The appeals allowed, the COA's decision set aside and the decision of the High Court restored.

Reported by Ashok Kumar